ABANG ZAILAN ABANG ZAINAL

v.

PUBLIC PROSECUTOR

HIGH COURT BORNEO
CHONG SIEW FAI J
[CRIMINAL APPEAL NO. KG11 OF 1991]
22 OCTOBER 1991

CRIMINAL PROCEDURE: *Sentencing - Consideration of other outstanding offences - Public interest - Should not have discharged charges on which accused pleaded guilty - Retrial - Position in Malaysia - English cases - CPC, s. 171A.*

Six charges of cheating were preferred against the appellant and the appellant pleaded guilty to each of the 6 charges. The police prosecuting officer applied to withdraw 3 charges (the said charges) under s. 171A of the Criminal Procedure Code (CPC).

After hearing the plea of mitigation, the magistrate sentenced the appellant to imprisonment and fines in relation to the first 3 charges. The Magistrate then acquitted and discharged the appellant in relation to the said charges. This was the appellant's appeal against the sentences imposed in relation to the first three charges.

The issue for the Court was the law relating to the consideration of outstanding offences for the purpose of sentencing.

Held:

[1] A trial Court has a wide discretion whether or not to take any offence into consideration and is entitled in appropriate cases to consider whether public interest requires separate investigation and prosecution.

[2] Taking an offence into consideration when sentencing does not in law constitute a conviction.

[3] The record of proceedings did not show that the learned Magistrate had in fact taken the said charges into consideration in sentencing the appellant. This is important in view of the ensuing effect or consequences provided in s. 171A(ii), particularly that if the offences had been taken into consideration, the offender would not be liable to be charged or tried in respect of the same. However, the Magistrate should not have acquitted and discharged the appellant of the said charges to which the appellant had pleaded guilty and admitted the facts as correct.

[4] Had it not been for the fact that the appellant had served both his principal and default imprisonment sentences and had in fact served a longer sentence in respect of charge (a), the Court would have set aside the sentences imposed and the orders of acquittal and discharge respecting the offences in the said charges, and would have further ordered all 6 cases to be remitted to the Magistrate's Court for retrial.

[5] In view of the extenuating circumstances, the custodial sentence served by the appellant over and above the default imprisonment sentences he had undergone were sufficient punishment for the offences committed by the appellant in the first 3 charges and the said charges which had also been taken into consideration. The lenient sentence taken in this case was principally due to the unfortunate features above mentioned and should not be regarded as a precedent in ordinary cases of the nature.

[Order accordingly.]

Cases referred to:
DPP v. Anderson [1978] 67 Cr App Rep 185 ***(cit)***
HC Bell [1922] 16 Cr App Rep 56 ***(cit)***
Smith [1921] 15 Cr App Rep 172 ***(foll)***
Nicholson [1947] 32 Cr App Rep 127 ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 171A

For the appellant - unrepresented.
For the respondent - Thomas Akin, DPP

JUDGMENT

Chong Siew Fai J:

The notes of proceedings in this appeal show that originally 6 charges of cheating were preferred against the appellant, each under one case. The 6 cases are:

(a) M/CR/523/90/A
(b) M/CR/496/90/A
(c) M/CR/521/90/B
(d) M/CR/522/90/C
(e) M/CR/586/90/C and
(f) M/CR/568/90/C

They were heard on the same day that is 28 February 1991.

The appellant pleaded guilty to each of the 6 charges. Facts of each case were read and explained to him. He admitted them all to be correct.

What happened next, according to the record, was that the police prosecuting officer, purportedly acting under s. 171A of the Criminal Procedure Code, applied to "withdraw" the 3 charges in cases (d), (e) and (f) and "to take into consideration of the other charge", whatever that may mean. There was then a brief plea of mitigation by the appellant followed by acceptance of the pleas of guilty by the learned trial Magistrate who after giving his reasons sentenced the appellant as follows:

(1) Under case (a) above: 3 years' imprisonment and a fine of RM1000 in default 2 months' imprisonment;

(2) Under case (b) above: 2 years' imprisonment and a fine of RM1000 in default 3 months' imprisonment; and

(3) Under case (c) above: 1 year's imprisonment; and a fine of RM1000 in default 3 months, imprisonment.

The sentences were ordered to run concurrently with effect from 28 February 1991. The learned trial Magistrate finally ordered: "The remaining charges be acquitted and discharged", which in the context meant the acquittal and discharge of cases (d), (e) and (f).

Against the sentences the appellant now appeals, contending that "sentence imposed was manifestly excessive".

The notes of proceedings of the lower Court reveal several irregularities. Most of them relate to the taking of other outstanding offences into consideration for the purpose of sentencing. In our country Malaysia, the law and procedure now in force, of enabling outstanding offences

to be taken into consideration for sentencing purposes was introduced in 1967 by s. 12 of the Criminal Procedure Code (Amendment) Act 1967 which came into effect on 1 June 1967 *vide* PU 205/1967. It takes the form of s. 171A of the Criminal Procedure Code. There is, however, little local case-law on the subject. A cursory look at the English position may be enlightening. In England, the procedure or practice originated from convention in the late 19th century. Since then it has developed through decided cases and gained recognition of the Courts. The practice was approved by the House of Lords in *DPP v. Anderson* [1978] 67 Cr App Rep 185 and is now well established.

I shall now deal with irregularities:

1. There is no conviction respecting each of the 3 charges in cases (a), (b) and (c) to which the appellant had pleaded guilty

2. There is, on record, no consent of the accused to offences in cases (d), (e) and (f) being taken into consideration for the purpose of sentencing. Section 171A(i) of the Criminal Procedure Code: *DPP v. Anderson* [1978] 67 Cr App Rep 185 *HC Bell* [1922] 16 Cr App Rep 56 .

3. There is nothing in the notes of proceedings showing whether the learned trial Magistrate had exercised his discretion to allow or refuse the application to take the 3 offences into consideration. Section 171A(i) uses the word "may". In *Smith* [1921] 15 Cr App Rep 172 Darling J in explaining the duty of the presiding Judge said:

> A Judge is not bound, in passing sentence, to take into account other charges pending against a prisoner. In *Syres*, 73 JP 13; 25 TLR. 71; 1 Cr App Rep 172: 1908, it was decided that a Judge may, in passing sentence, take into account other charges which a prisoner admits.

The same duty applies to a presiding Magistrate. The trial Court, therefore, has a wide discretion whether or not to take any offence into consideration and is entitled in appropriate cases to consider whether the public interest requires separate investigation and prosecution. But decide it must. It is to be remembered that taking an offence into consideration does not in law constitute a conviction.

4. On the assumption that the learned trial Magistrate had acceded to the application of the prosecution, the record does not show that the learned trial Magistrate had in fact taken the 3 offences in cases (d), (e) and (f) into consideration in sentencing the appellant (see the judgment at p. 4 of the notes of proceedings). This is important in view of the ensuing effect or consequences provided in s. 171A(ii), particularly that if the offences had been taken into consideration, the offender would not be liable to be charged or tried in respect of the same. In this connection, the following observation of Humphreys J in *Nicholson* [1947] 32 Cr App Rep 127 expressing the rationale is enlightening:

> Where a list of outstanding offences has been taken into consideration by a Court, the reason why it is undesirable that the person convicted should be tried again for any one of those offences is that there would be a danger of his being twice punished for the same offence ... (p. 131)

5. Whatever the situation, the learned trial Magistrate ought not to have acquitted and discharged the appellant of the 3 offences in cases (d), (e) and (f) to which the appellant, as appearing from the record, had pleaded guilty and admitted the facts as correct.

In view of the unsatisfactory features I would have set aside the sentences imposed and the orders of acquittal and discharge respecting the offences in cases (d), (e) and (f), and would have ordered all the 6 cases to be remitted to the Magistrate's Court for retrial had it not been for the fact that it was disclosed during the hearing of this appeal that the appellant had not only completed serving the imprisonment sentences in default of payment of the fines (hereinafter referred to as "the default imprisonment sentences") but had also continued to serve the principal imprisonment sentences imposed by the lower Court despite the stay of the principal imprisonment sentences pending appeal having been granted by the lower Court because the prison authorities had not been informed of the stay. There is also another unfortunate feature in that the registry of the lower Court had erroneously notified the prison authorities that the default imprisonment sentence for M/CR/523/90/A was 3 months when in fact the Court ordered only 2 months.

In view of the extenuating circumstances, and to compensate for the injustice done to the appellant, and also because it is rather undesirable to send the appellant back to the prison from where he had been released 4 days ago (on 18 October 1991), on account of the error through no fault of his, I decided to be lenient to him and consider it not unreasonable to do so. I would regard the custodial sentence hitherto served by the appellant over and above the default imprisonment sentences that he had undergone as sufficient punishment for the offences committed by the appellant in cases (a), (b) and (c) as well as in cases (d), (e) and (f) which are also taken into consideration. Public interest would also be served if the appellant would grasp this opportunity to turn to honest living which I hope he would. I wish, however, to make clear that the lenient course taken in this case was principally due to the unfortunate features mentioned above which do not appear to be fair to the appellant, particularly the continuation of imprisonment despite the stay ordered by the lower Court and should not be regarded as a precedent in ordinary cases involving offences of this nature.

To rectify the errors and to avoid any misunderstanding, I would summarise my decisions as follows:

(1) the appellant is convicted of the offences in cases (a), (b) and (c) to which he had pleaded guilty;

(2) the principal imprisonment sentences imposed by the lower Court in cases (a), (b) and (c) are set aside;

(3) the orders of acquittal and discharge respecting the offences in cases (d), (e) and (f) are set aside; and

(4) the period of the appellant's detention in the prison in excess of the default imprisonment sentences he had served be treated as sufficient punishment for offences in cases (a), (b) and (c) as well as in cases (d), (e) and (f) which have been taken into consideration.

Also found at [1992] 1 CLJ 85